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No. 95-1723

In The

Supreme Court of the United States

October Term 1995

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA, AND JOANNE SIRAGUSA,

Petitioners,

vs.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHARTERED,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF

The National Association of Securities and Commercial Law Attorneys (NASCAT), by counsel and pursuant to Rules 37.1 and 37.3(b), hereby submits its Motion for Leave to File a Brief as *Amicus Curiae* in support of Petitioners. NASCAT respectfully submits that its Motion should be granted for the following reasons:

1. NASCAT is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee benefit, environmental, pension and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud and so-called "white collar" criminal activity. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent wrongful, fraudulent, deceptive and manipulative business practices.

2. NASCAT and its members have a profound interest in the scope and bases of civil liability sought to be imposed against wrongdoers under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. NASCAT's members have represented the victims of fraudulent schemes and so-called "white collar" crime in many significant civil RICO actions brought in recent years, including *In re American Continental Corp./ Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992); *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338

(E.D.N.Y. 1993); and *In re ZZZZ Best Sec. Litig.*, 864 F. Supp. 960 (C.D. Cal. 1994). Because of their experience representing the victims of fraud in civil RICO actions, NASCAT's members can offer a helpful perspective to this Court in evaluating the arguments made by Petitioners and Respondents in this case, which concerns the appropriate accrual rule for the four-year statute of limitations governing civil RICO actions.

3. In addition, counsel for NASCAT in this proceeding have published numerous commentaries concerning civil RICO litigation and jurisprudence. Professor G. Robert Blakey is the author (or co-author) of numerous law review articles concerning RICO, including G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 Vand. L. Rev. 851 (1990). NASCAT's counsel of record, Kevin P. Roddy, is the author (or co-author) of numerous law review articles concerning civil RICO litigation, and is the author of a two-volume treatise entitled *RICO in Business and Commercial Litigation* (Shepard's/McGraw-Hill, Inc. 1991 & Cum. Supp. 1996). Their forthcoming article, G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding and Abetting and Conspiracy Liability*, which will be published in the September 1996 issue of the *American Criminal Law Review*, addresses (among other topics) the Question Presented in this case: the proper accrual rule for the four-year statute of limitations governing civil actions brought under § 1964(c) of RICO, 18 U.S.C. § 1964(c).

4. NASCAT seeks to file the attached *amicus curiae* brief because it supports reversal of the Ninth Circuit's

decision in this case. *See Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, No. 95-1723, 1996 U.S. LEXIS 3909 (June 17, 1996). In the attached *amicus* brief, NASCAT advocates this Court's adoption of the "last predicate act" rule of accrual followed by the Third Circuit in civil RICO cases, as set forth in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988). For the reasons stated in the attached *amicus* brief, NASCAT respectfully submits that this is the most appropriate rule of accrual and should be selected by this Court as a uniform rule governing all civil RICO actions.

5. This Court has the inherent authority to appoint an *amicus curiae*, or "friend of the court," to assist it in analyzing and deciding a case. *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 960 n.10 (M.D. Fla. 1993); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991). This Court (and the lower federal courts) have long recognized the beneficial role that an *amicus curiae* such as NASCAT can play by "alert[ing] the court to the legal contentions of concerned bystanders," *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 533 (7th Cir. 1988), and contributing to the Court's understanding of the issues before it. *Harris v. Pernsley*, 820 F.2d 592, 603 (3d Cir.), *cert. denied*, 484 U.S. 947 (1987).

6. NASCAT has historically participated as *amicus curiae* in cases arising under RICO, the federal securities laws, state tort laws and the Employee Retirement Income Security Act, and NASCAT has filed *amicus curiae* briefs in this Court in numerous cases. *See, e.g., Varity*

Corp. v. Howe, No. 94-1471 (ERISA); *BMW of North America, Inc. v. Gore*, No. 94-896 (punitive damages); *Curtiss-Wright Corp. v. Schoonejongen*, No. 93-1935 (ERISA); *Plaut v. Spendthrift Farm, Inc.*, No. 93-1121 (statute of limitations); *Gustafson v. Alloyd Co.*, No. 93-404 (securities fraud); *Boca Grande Club, Inc. v. Florida Power & Light Co.*, No. 93-180 (contribution); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, No. 92-854 (securities fraud); *TXO Production Corp. v. Alliance Resources*, No. 92-479 (punitive damages); *Musick, Peeler & Garrett v. Employers Insurance of Wausau*, No. 92-34 (contribution); *Reves v. Ernst & Young*, No. 91-886 (RICO); and *Holmes v. Securities Investor Protection Corp.*, No. 90-727 (RICO). NASCAT respectfully submits that its submission of the attached brief as *amicus curiae* will assist the Court in deciding the issues presented in this case.

7. Pursuant to Rule 37.3(b), counsel for NASCAT sought and received written consent from Petitioners' counsel to file the attached *amicus curiae* brief; however, counsel for Respondents have refused to provide their consent. Accordingly, NASCAT was compelled to file this Motion for Leave to file the attached Brief as *Amicus Curiae*.

For the reasons stated above, NASCAT respectfully submits that its Motion for Leave to File a Brief as *Amicus Curiae* should be granted.

DATED: August 14, 1996

Respectfully submitted,

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For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF PETITIONERS

QUESTION PRESENTED

Does a civil action brought under § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), accrue when the victim knows or should know that she was injured – even though she does not know of the existence of a pattern of racketeering activity – or only when she knows or should know that her injury was caused by defendants and was, in fact, part of a pattern of racketeering activity?

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I. INTEREST OF AMICUS CURIAE

The interest of *amicus curiae*, the National Association of Securities and Commercial Law Attorneys (NASCAT), is set forth in the foregoing Motion.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Since this Court's decision nine years ago in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987) (*"Malley-Duff"*), which held that a four-year limitations period borrowed from federal antitrust law governs civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968, the circuit courts have adopted several conflicting rules governing *when* civil RICO actions *accrue*. This case presents an opportunity for this Court to resolve this split in the circuits and adopt a uniform rule of accrual.

Many circuit courts have adopted the so-called "injury discovery" rule, which holds that a civil RICO claim accrues when a victim discovers (or should have discovered) his injury, even if the existence of the remaining elements of the RICO claim are unknown. A more acceptable variation, the so-called "injury and pattern discovery" rule, which has been adopted in other circuits, ameliorates the unjust impact of the "injury discovery" rule, but does not fully reflect RICO's broad remedial purposes, which are embodied in its statutory language and legislative history. For the reasons stated herein, NASCAT respectfully submits that the "last predicate act" rule, which was ably elucidated by the Third Circuit in *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-33 (3d Cir. 1988) (*"Keystone"*), is the most appropriate accrual rule and should be adopted by this Court.

III. ARGUMENT

A. Given The Conflicting Rules Adopted By The Circuit Courts Following *Malley-Duff*, It Is Appropriate For This Court To Elucidate A Uniform Rule of Accrual For Civil RICO Actions

When Congress enacted RICO in 1970, as is so often the case, it failed to institute a specific limitations period for actions brought under the statute. *See Chardon v. Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J. dissenting) ("[f]ew areas of the law stand in greater need of firmly defined, easily applied rules"). With regard to *civil* RICO cases, the applicable limitations period remained unsettled until this Court decided *Malley-Duff*, 483 U.S. at 156, which held that a uniform four-year period, as borrowed from federal antitrust law in the Clayton Act, 15 U.S.C. §15(b), would be the applicable period for civil RICO claims. *Id.*[1] This Court, however, expressly refused to reach the question of *when* the four-year limitations period begins to accrue[2] in a civil RICO action,[3] leaving the issue for the lower federal courts to try to resolve.

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[1] *See generally* Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. Pa. L. Rev. 1447 (1987) (discussing *Malley-Duff* in the context of federal jurisprudence on statutes of limitations); *Special Project – Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1084-94 (1980) (discussion qualifications to time bars, including accrual and tolling doctrines).

[2] "Accrual" refers to the point at which a cause of action may be maintained. Black's Law Dictionary 20-21 (6th ed. 1990). The start of a limitations period and the accrual of a cause of action are terms used synonymously by many courts. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.") (citations omitted); *see also United States v. Kubrick*, 444 U.S. 111, 122 (1979) (knowledge of injury and who injured you); *but see Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (in cases where fraud is alleged, the claim accrues when the plaintiff suffers injury, but the statute of limitations does not run until the claim is discovered). Federal law governs when the RICO cause of action accrues in this case. *See Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Fisher v. Whiton*, 317 U.S. 217, 218 (1942).

As the court below noted, *see Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.), *cert. granted*, No. 95-1723, 1996 U.S. LEXIS 3909 (June 17, 1996), in the wake of *Malley-Duff* the circuits have split on the question of *when* the four-year limitations period begins to run to such an extent that several differing theories of accrual have been generated. *See Granite Falls Bank v. Henrikson*, 924 F.2d 150, 152 (8th Cir. 1991) (describing a "smorgasbord of civil RICO accrual rules" from which to select the most appropriate rule).[4] While there is some common ground

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[3] In *Malley-Duff*, Justice O'Connor stated in pertinent part:

> This litigation was filed on March 20, 1981, less than four years after the earliest time *Malley-Duff*'s RICO action could have accrued – *i.e.*, the date of *Malley-Duff*'s termination on February 13, 1978. Accordingly the litigation was timely brought. Because it is clear that *Malley-Duff*'s RICO claims accrued within four years of the time the complaint was filed, we have no occasion to decide the appropriate time for accrual for a RICO claim.

483 U.S. at 156-57.

[4] For commentary on the various accrual rules and their ramifications in civil RICO litigation, *see generally* Douglas Abrams, *The Law of Civil RICO* §2.4 (Little Brown & Co. 1991 & Cum. Supp. 1996) (*"Civil RICO"*); Salgado, *The Time-Expired Civil RICO Claim and Subsequent Predicate Acts*, 68 Denver L. Rev. 445 (1991); Paul B. O'Neill, *"Mother of Mercy, Is This the Beginning of RICO?": The Proper Point of Accrual of a Private Civil*

among the circuits concerning this issue because, in the words of the Eighth Circuit, each one has "incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit," *Granite Falls*, 924 F.2d at 153; *see also McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992) ("Every court that has considered an accrual rule for civil RICO has adopted some sort of discovery rule."), the circuits diverge over the "question of what the plaintiff must actually or constructively know before the limitations period will start to run." *Granite Falls*, 924 F.2d at 153. As previously pointed out by Petitioners, *see* Petition for Writ of Certiorari at 9, the differing accrual rules followed in the lower federal courts provide widely differing periods of time within which an injured person or entity may investigate and bring a civil RICO action; indeed, such differences are frequently outcome determinative, as the facts of this case demonstrate.

For the reasons stated herein, NASCAT respectfully submits that it is the appropriate time (and this is the appropriate case) for this Court to adopt a uniform rule of accrual governing civil RICO actions. *See Chardon*, 462 U.S. at 669 (Rehnquist, J., dissenting). Although a numerical majority of the circuit courts have adopted the so-called "injury discovery" and "injury and pattern discovery rules," *see* Part III.B, *infra*, given their limitations this Court should follow the "last predicate act" accrual rule announced by the Third Circuit in *Keystone*, 863 F.2d at 1130-33. *See* Part III.C-D, *infra*.

RICO Action, 65 N.Y.U.L. Rev. 172 (1990) ("*Proper Point of Accrual*"); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L.J. 1399 (1990) ("*Uniform Rule of Accrual*"); Edwin Scott Hackenberg, *All the Myriad Ways: Accrual of Civil RICO Claims in the Wake of Agency Holding Corp. v. Malley-Duff*, 48 La. L. Rev. 1411 (1988) ("*Accrual of Civil RICO Claims*").

B. While The Majority Of The Circuit Courts Have Adopted The "Injury Discovery" And "Injury And Pattern Discovery Rules," Their Limitations Weigh Against Their Adoption By This Court

The First, Second, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits employ an *injury*-based accrual rule. Under this method, as the court below explained, a civil RICO action accrues at the time plaintiff *discovered* or should have discovered his, her, or its *injury*. *See Grimmett*, 75 F.3d at 511 (" 'The limitations period [for civil RICO actions] begins to run when a plaintiff knows or should know of the injury which is the basis for the action.' ") (quoting *Stitt v. Williams*, 919 F.2d 516, 525 (9th Cir. 1990)).[5] Significantly, under the "injury discovery" rule a civil RICO plaintiff "need not discover that the injury is part of a 'pattern of racketeering' for the period to begin to run." *Grimmett*, 75 F.3d at 510 (quoting *McCool*, 972 F.2d at 1465).

The injustice of the so-called "injury discovery" rule may be illustrated by a simple hypothetical situation

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[5] *See also Rodriguez v. Banco Cent.*, 917 F.2d 664, 665 (1st Cir. 1990) (Breyer, Ch.J.) ("[T]he statute begins to run when a plaintiff discovered, or should have discovered, his injury."); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988) (same), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (RICO's limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action."); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986) (same); *McCool*, 972 F.2d at 1464-65 (same); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (same); Abrams, *Civil RICO*, §2.4, at 61 ("A civil RICO claim accrues when the plaintiff discovered or had reason to discover the proprietary injury that is the basis of the claim.") (footnotes and citations omitted).

common to civil RICO actions: Suppose plaintiff suffers an injury to his business or property in 1980 when defendant commits an illegal act that constitutes a predicate act of "racketeering activity."[6] Assume that plaintiff discovers that injury in 1984. Although injured, plaintiff has no civil RICO action at this point because there is as yet no "pattern of racketeering activity"; even under the most liberal interpretation of the pattern requirement, at least two predicate acts are necessary.[7] Assume further that plaintiff sustains another injury caused by another predicate act committed by defendant; plaintiff discovers the second injury in 1990 and then files a civil RICO action. Under the "injury discovery" accrual rule, it is arguable that plaintiff would be unable to recover for the 1984 injury, even though he sustained two injuries caused by predicate acts of racketeering occurring within ten years of each other, the baseline requirement for a civil

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[6] *See* 18 U.S.C. §1961(1) (defining "racketeering activity" to include such offenses as bribery, arson, extortion, and threats to commit any of the above, as well as other activities already criminalized elsewhere in the U.S. Code, such as mail fraud, wire fraud, interstate transportation of stolen property, embezzlement and bankruptcy fraud).

[7] *See* 18 U.S.C. §1961(5) (defining "pattern of racketeering activity"); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.") (emphasis in original); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("It is the factor of *continuity plus relationship* which combines to produce a pattern. . . . 'criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' ") (emphasis in original; citation omitted).

RICO claim. *See* 18 U.S.C. §§1961(5), 1962(c) and 1964(c); *but see Grimmett*, 75 F.3d at 512 ("[A] RICO cause of action cannot accrue until all the elements exist."). Courts applying the "injury discovery" rule would hold that the 1984 discovery triggered the four-year limitations period, so plaintiff's civil RICO claim became time-barred in 1988, before he could allege a pattern of racketeering activity that included the 1990 injury. *See, e.g., State Farm Mut. Auto Ins. Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987) (discovery of each injury triggers RICO's four-year statute of limitations beyond which plaintiff may not recover for such injury).

As a result of this possible injustice, the "injury discovery" accrual rule is subject to well-justified criticism,[8]

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[8] *See* O'Neill, *Proper Point of Accrual*, 65 N.Y.U.L. Rev. at 205-06 ("[U]nder the discovery rule it is possible that a plaintiff could discover an injury caused by a defendant's racketeering act and have the statute of limitations run on that injury prior to the time of the commission of the second predicate act necessary to perfect plaintiff's right to relief under the statute. The RICO plaintiff might have part of his cause of action barred before he ever has the opportunity to sue.") (footnote omitted); Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1410 (noting that the "injury discovery" accrual rule "may clash with the pattern requirement" because "[i]f the claim accrues after the first injury but before the plaintiff can state a pattern, plaintiff may be time barred before he can state a claim. . . . Because of this defect, the discovery rule cannot be reconciled completely with the pattern requirement of RICO and is therefore not the best accrual rule for RICO actions.") (footnote omitted); Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 Minn. L. Rev. 827, 879 (1987) ("Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied, it is inappropriate to start the limitations period before the pattern is fully developed."); Abrams, *Civil RICO*, §2.4, at 62 ("The discovery rule has encountered criticism because a civil RICO plaintiff might suffer proprietary injury (and thus might

which the court below, of course, sidestepped. *See Grimmett*, 75 F.3d at 512. Recognizing the severe limitations inherent in the "injury discovery" rule, the Third, Sixth, Eighth, Tenth and Eleventh Circuits have adopted an accrual rule that applies the general discovery rule to *both* the "pattern" element *and* the "injury" element of the civil RICO cause of action.[9] These courts find that a civil RICO action does not accrue until "the plaintiff knows, or should have known, of his injury *and that the injury is part of a pattern of racketeering activity*." *Bivens Gardens*, 906 F.2d at 1554 (emphasis added). In the further words of the Eleventh Circuit:

> We hold . . . that with respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, *both the existence and source of his injury and that the injury is part of a pattern*. . . . Because a civil RICO plaintiff must prove that his injury is part of a pattern of racketeering activity, an injured party must know, or have reason to know, that his injury is part of a pattern before he can be expected to file a civil RICO cause of action.

Id. at 1554-55 (emphasis added).[10] In the court below, Petitioners argued that the Ninth Circuit should adopt

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discover or have reason to discover that injury) well before the defendant commits sufficient predicate acts to constitute a pattern of racketeering activity.").

[9] *See, e.g., Keystone*, 863 F.2d at 1130-31; *Caproni v. Prudential Sec.*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls*, 924 F.2d at 154; *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1553-54 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

[10] *See also District 65 Retirement Trust for Members of the Bureau of Wholesale Sales Representatives v. Prudential Sec.*, 925 F. Supp. 1551, 1563-64 (N.D. Ga. 1996). The *Bivens Gardens* rule has been followed in the Eighth Circuit, *see Association of Commonwealth Claimants v. Moylan*, 71 F.3d 1398, 1402 (8th Cir. 1995), the Sixth Circuit, *see Caproni*, 15 F.3d at 619-20 (under the "injury and pattern discovery" rule, the plaintiff must "discover or be in a position to discover, the existence of a pattern of racketeering activity *in addition to* the existence . . . of the injury") (emphasis added; footnote omitted); *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 240-42 (6th Cir. 1992) (civil RICO claim time-barred under either "injury discovery" rule or "injury and pattern discovery" rule), and the Tenth Circuit, *see* note 9, *supra*; *see also Wilder v. Meyer*, 779 F. Supp. 164, 168 (S.D. Fla. 1991); *Randolph County Fed. Sav. & Loan Ass'n v. Sutliffe*, 775 F. Supp. 1113, 1117-18 (S.D. Ohio 1991).

the "injury and pattern discovery" rule followed in the Sixth, Eighth, Tenth and Eleventh Circuits, and leveled several compelling criticisms at the "injury discovery" rule, *see Grimmett*, 75 F.3d at 511-12, which the court below refused to heed.[11] This case, however, presents this Court with a fresh opportunity to determine which of several competing accrual rules is the most appropriate for civil RICO actions.

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[11] The Ninth Circuit panel, per Judge Hall, refused to waver from the "injury discovery" rule, stating in pertinent part:

> We do not find Siragusa's criticisms persuasive enough to warrant abandonment of the "injury discovery" rule. Moreover, the "injury discovery" rule encourages diligence in RICO prosecutions and insures that evidence remains fresh. For these reasons, we reaffirm this Circuit's rule that a civil RICO cause of action arises when the plaintiff knows or should know that she has been injured.

75 F.3d at 512.

Muddying the rough distinction between these groups – *i.e.*, injury-based accrual versus injury- and pattern-based accrual[12] – is the fact that some courts in both groups utilize a "separate accrual" rule.[13] Under this rule, each time a plaintiff suffers an independent RICO injury, a new RICO cause of action accrues (a) when plaintiff discovers or should have discovered his injury ("injury-based" accrual), *see, e.g., Bankers Trust*, 859 F.2d at 1102; or (b) when plaintiff discovers or should have discovered

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[12] Most commentators (*see* notes 4 and 8, *supra*) have criticized these disparate rules of accrual and some have even proposed alternative theories. *See, e.g.*, O'Neill, *Proper Point of Accrual*, 65 N.Y.U.L. Rev. at 234-36 (proposing the "pattern formation rule" in which the running of the statutory period is postponed until the plaintiff first discovers or should have discovered the facts relating to two predicate acts necessary to bring a civil RICO action).

[13] In his concurrence in *State Farm Mut. Auto. Ins. Co.*, 828 F.2d at 5, then-Judge Kennedy first applied the "separate accrual" rule in the RICO context:

> The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and the other acts were committed outside the limitations period. A corollary rule is that damages may not be recovered for injuries sustained as a result of acts committed outside the limitations period.

Id. (citations omitted); *see also* Abrams, *Civil RICO*, §2.4, at 65. To date, some form of the "separate accrual" rule has been adopted by the First, Second, Seventh, Eighth, Tenth and Eleventh Circuits. *See, e.g., Rodriguez*, 917 F.2d at 666; *Bankers Trust*, 859 F.2d at 1102; *McCool*, 972 F.2d at 1464-66; *Granite Falls*, 924 F.2d at 154; *Bath*, 913 F.2d at 820; *Bivens Gardens*, 906 F.2d at 1554-55. *See also Grimmett*, 75 F.3d at 510-11 (collecting cases). The "separate accrual" rule is discussed and criticized in Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1411-13.

his injury and that the injury is part of a pattern ("injury- and pattern-based" accrual), *see, e.g., Bivens Gardens*, 906 F.2d at 1554-55. For example, in *Bankers Trust* the defendant officers of a bankrupt corporation (1) wrongfully concealed assets during a 1974-76 bankruptcy proceeding; (2) conducted harassing lawsuits in 1978-79 to prevent plaintiff from vacating the fraudulently obtained bankruptcy plan; and (3) fraudulently conveyed property in 1981. 859 F.2d at 1098-99. Plaintiffs incurred various legal fees and expenses over time, besides the loss of the debt itself. (The loss of the debt, although not time-barred, was dismissed without prejudice because its amount was speculative. *See id.* at 1105-06.) Noting that in enacting RICO, Congress had in mind the possibility of "multiple and independent [injuries] that occur over a broad span of time," the Second Circuit held that a rule permitting a new cause of action to accrue with each independent injury was "[t]he logical end result." *Id.* at 1103. Thus, the court adopted the "separate accrual" rule and found that the final two injuries were "independent" of the first. *Id.* at 1102-05.[14]

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[14] A necessary corollary of the separate accrual rule, as developed in the Second Circuit, is that plaintiff may only recover for injuries discovered or discoverable within four years of the time suit is brought. *See Bankers Trust*, 859 F.2d at 1104-05. "As long as separate and independent injuries continue to flow from the underlying RICO violations – regardless of when those violations occurred – plaintiff may wait indefinitely to sue, but may then win compensation only for injuries discovered or discoverable within the four-year 'window' before suit was filed, together, of course, with any provable future damages." *Bingham v. Zolt*, 66 F.3d 553, 560 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1418 (1996) (citing *Bankers Trust*, 859 F.2d at 1103). *See also Cruden v. Bank of New York*, 957 F.2d 961, 977 (2d Cir. 1992); *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1116-19 (S.D.N.Y. 1993); Abrams, *Civil RICO*, §2.4, at 63 (discussing "separate accrual" cases).

Another version of the "separate accrual" rule was recognized by the Eleventh Circuit in *Bivens Gardens*, where defendants were accused of committing three sets of acts: (1) a wrongful takeover of a limited partnership in 1975; (2) the mismanagement and diversion of the partnership's assets from 1975 to 1981; and (3) the sale of a hotel, the partnership's primary asset, at below fair market value in 1981. 906 F.2d at 1549-51. The Eleventh Circuit held that the mismanagement and subsequent sale of the hotel were "new and independent" acts because they "[were] not included among the injuries that naturally flow from the wrongful takeover [in 1975]." *Id.* at 1551.

In subsequent cases, courts have recognized that although separate limitations periods may accrue from new injuries, the separate accrual "is limited to distinct and independent injuries."[15] In this case, the Ninth Circuit held that acts in furtherance of Respondent's scheme to conceal Petitioner's ex-husband's interest in

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[15] *Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342, 1352 (D. Minn. 1995), *aff'd*, 87 F.3d 231 (8th Cir. 1996). For example, in *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991), plaintiffs brought their RICO actions in 1988 after defendants had ceased production of an allegedly defective furnace in 1983, thus ending the pattern of racketeering activity. Appealing the dismissal of their RICO claims, plaintiffs argued that although they first suffered injury, in the form of excessive repairs, prior to the expiration of the four-year limitations period, they suffered a "new and independent injury" in 1984 when they had to replace the furnace. This new injury, they claimed, reset the statute of limitations' clock. *Id.* at 706-07. The Third Circuit found that plaintiffs' replacement of the furnace did not constitute a new and distinct injury but, rather, a continuation of their initial injury. Thus, "the mere continuation of damages into a later period will not serve to extend the statute of limitations." *Id.* at 708.

the medical practice, which occurred after Petitioner had filed her fraud complaint in the bankruptcy court, did not result in any "new and independent" injuries so as to start the four-year limitations period running anew on the civil RICO claims. 75 F.3d at 513-14.

While the circuit courts have sought to justify the "injury discovery" accrual rule, the "injury and pattern discovery" rule and/or the "separate accrual" rule, their vagaries mean that meritorious plaintiffs' civil RICO claims may be unjustifiably time-barred, such as in the case at bar. The factual variations evident in civil RICO litigation demonstrate the need for this Court to adopt a uniform rule of accrual which takes into account the different ways in which RICO claims manifest themselves and accrue. For example, where plaintiff's civil RICO claims are grounded in fraud and plaintiff has alleged mail fraud, wire fraud and/or securities fraud as the requisite predicate acts,[16] the plaintiff has, in many cases, sustained only a "single" (albeit economically significant) injury from defendants' course of illegal conduct. In those cases (such as *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 792 F. Supp. 1424 (D. Ariz. 1992), a securities fraud/civil RICO class action brought on behalf

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[16] *See* 18 U.S.C. §1961(1) (definition of "racketeering activity") and note 6, *supra*. Section 107 of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 758 (1995), which took effect on December 22, 1995 and amended §1964(c) of RICO to eliminate "fraud in the sale of securities" as a predicate act of racketeering activity, does not apply retroactively. *See, e.g., District 65*, 925 F. Supp. at 1566-70; *In re Prudential Sec. Ltd. Partnerships Sec. Litig.*, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,253, at 95,433-37 (S.D.N.Y. 1996). *See generally* G. Robert Blakey & Kevin P. Roddy, *Securities Reform and RICO: A Lawyer's Dream*, 23 RICO L. Rptr. 802, 812-16 (June 1996).

of 23,000 defrauded investors who lost hundreds of millions of dollars when worthless subordinated debentures issued by a holding company and sold in the branches of a thrift institution controlled by now-twice-convicted felon Charles H. Keating, Jr. went into default), plaintiffs are injured only once by the alleged pattern of racketeering activity.[17] In more complex cases, such as *Prudential Securities*, ¶ 99,253, at 95,432-33, a securities fraud/civil RICO class action brought on behalf of more than 100,000 investors who lost hundreds of millions of dollars when they were fraudulently induced to invest in limited partnerships worth substantially less than represented by the general partners/promoters, the existence of multiple injuries resulting from virtually innumerable predicate acts complicates the accrual question. *Id.*[18] The four-year

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[17] A similar fact pattern was presented to the Second Circuit in *Cruden*, 957 F.2d at 977-78, a civil RICO action brought by debenture holders, where Judge Cardamone succinctly stated the applicable rule:

> Plaintiffs were injured within the meaning of §1964(c) [of RICO] when Computer and International defaulted in 1983. Hence, regardless of when other RICO *violations* may have occurred, plaintiffs' RICO *cause of action* accrued at the time of default, and the four-year statute of limitations began to run on the action at that time.

Id. (emphasis in original). As the Third Circuit recognized in *Keystone*, 863 F.2d at 1133, "[t]he [injury discovery accrual] rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time." That fact pattern, however, is not typical of sophisticated schemes to defraud.

[18] In *Prudential Securities*, plaintiffs and the members of the class invested in six limited partnerships formed between 1985 and 1991. Applying the discovery rule followed in the Second Circuit, *see Bankers Trust*, 859 F.2d at 1103, and note 14, *supra*,

period begins to run on each of the injuries when that injury is discovered, but the application of the "injury discovery" rule of accrual to the multiple injury case results in a divisible cause of action, making it likely that a plaintiff's meritorious claim may be partially barred by the statute of limitations when she has suffered multiple injuries arising from multiple predicate acts extending over a period of time.[19]

Senior Judge Pollack analyzed the accrual of the investors' civil RICO claims:

> The statute of limitations did not begin to run on the date that investors received prospectuses in the limited partnerships, but at the date investors were in possession of sufficient information to suggest the probability of fraud. This did not occur until, at earliest, October, 1990, when capital losses were first suffered as a result of the sale of Polaris aircraft. Indeed, the record currently before the Court contains no indication that investors even learned of these capital losses until January of 1992, when the format of Prudential's monthly statements was altered so that the value of investments was no longer recorded at par. Thus, it cannot be determined at this stage of the case as a matter of law that investors in any of the Polaris limited partnerships were on notice of their injuries at a point four years prior to the filing of this suit on June 8, 1994.

¶ 99,253, at 95,433.

[19] As one commentator has criticized the "separate accrual" rule:

> [C]ourts adopting the separate accrual discovery rule seem to have overlooked the implications of this rule for plaintiff's remedy. Under the separate accrual discovery rule, plaintiff may only recover damages for those acts that took place within the four years before he filed his claim. This corollary for damages effectively diminishes any advantages derived from

Both the "injury discovery" rule and the "injury and pattern discovery" rule lead invariably to the dismissal of meritorious civil RICO claims. Neither accrual rule – even when tempered by the "separate accrual" jurisprudence developed in the Second Circuit – is (or can be) easily tailored to RICO's statutory language or the public policy underlying the statute. NASCAT respectfully submits that the uniform rule of accrual to be adopted by this Court must match RICO's statutory language, legislative purpose, and the elements of civil RICO actions that have been repeatedly recognized by this Court and the lower federal courts. As set forth below, the only accrual rule that properly fits those parameters is the "last predicate act" accrual rule followed in the Third Circuit. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1983) (five different incidents alleged in "pattern or practice" in violation of Fair Housing Act; only first four incidents involved plaintiff Coleman, but the limitations period for "continuing violations" ran from the *last* incident; noting

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> allowing the plaintiff time to discovery his injury: The damages corollary put forth in the concurrence subtracts the time allowed to discover the action from the four year statute of limitations.
>
> If the last act occurred in 1982, and the injury not discovered until 1984, plaintiff does not have four years from the discovery of the injury in which to file a claim; if he waits until 1988, he will be barred, as no injuries occurred after 1982. If he is to recover damages, he has only two years from the time of discovery of the injury in which to bring his claim.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1412 and n.85; *see also* Hackenberg, *Accrual of Civil RICO Claims*, 48 La. L. Rev. at 1414 (same).

that "wooden application" of statute "ignores the continuing nature of the alleged violation, [and] only undermines the broad remedial intent of Congress embodied in the Act") (citations omitted).

C. This Court Should Adopt The "Last Predicate Act" Accrual Rule Followed In The Third Circuit

The Third Circuit was the first federal appeals court to depart from the injury-based accrual civil RICO rules and apply discovery principles to the *pattern of racketeering activity* element of a RICO cause of action.[20] The "last predicate act" accrual rule employed in the Third Circuit, as announced in *Keystone*, 863 F.2d at 1130-31, states that

> the limitations period for a civil RICO claim runs from the date the plaintiff knew or should

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[20] RICO renders criminally and civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, 18 U.S.C. §1962(a); who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," §1962(b); who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity," §1962(c); or, finally, who conspires to violate the first three subsections of §1962, §1962(d). *See H.J., Inc.*, 492 U.S. at 232-33. Thus, a violation of Section 1962(c) "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . In addition, the plaintiff only has standing if, and only can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima*, 473 U.S. at 496; *see also NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 803-04 (1994). While "pattern" is usually the key element, other elements (*i.e.*, investment or use) may be crucial in certain situations. *See* 18 U.S.C. §1962(a); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165 (3d Cir. 1989) (elements of §1962(a) claim).

> have known that the elements of the civil RICO cause of action existed *unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. If the complaint was filed within four years of the last injury or the last predicate act, the plaintiff may recover for injuries caused by the other predicate acts which occurred outside an earlier limitations period but which are part of the same "pattern."*

Id. (emphasis added). In *Keystone*, plaintiff alleged an ongoing pattern of racketeering activity that continued at least until September 1983, when an act of mail fraud was committed for which defendants were criminally convicted and sentenced in 1986. Plaintiff filed its RICO claim one month later, in July 1986. *Id.* at 1127. Reversing the district court's decision (which had ruled the claim untimely under a so-called "last injury discovery" rule), the Third Circuit held that plaintiff's RICO claim was timely filed under the "last predicate act" accrual rule. In reaching this conclusion, the court (per Judge Mansmann) carefully examined RICO's express purpose, statutory language and legislative history, as well as the elements and injury requirement of a civil RICO action. *Id.* at 1127-33.[21] *See also Glessner*, 952 F.2d at 706-07 (explicating

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[21] In *Keystone*, plaintiff was not injured by *every* predicate act that constituted the pattern of racketeering activity alleged in the complaint. Nevertheless, for purposes of RICO claim accrual, the Third Circuit held that plaintiff's RICO claim was not time-barred because the last predicate act, which did not injure plaintiff, was part of the *pattern* that injured plaintiff and

Keystone rule); *Gurfein v. Sovereign Group*, 826 F. Supp. 890, 909 (E.D. Pa. 1993) (same).[22] In reaching this conclusion, the Third Circuit recognized that "the essential problem" with the so-called "injury-based" civil RICO accrual rules

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fell within the limitations period. 863 F.2d at 1130. Likewise, for purposes of RICO standing, this Court (and the lower federal courts) have found that a plaintiff need not be injured by every predicate act. *See Sedima*, 473 U.S. at 495; *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988); *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 810 (7th Cir. 1987); *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 437 & n.6 (D.N.J. 1991).

[22] Although *Keystone*'s "last predicate act" accrual rule appears more liberal than the injury-based or injury- and pattern-based accrual rules followed in other circuits, both the Third Circuit and district courts therein have not hesitated to dismiss civil RICO claims that were not timely brought. *See, e.g., Arab African Int'l Bank v. Epstein*, 10 F.3d 168, 174-75 (3d Cir. 1993) (rejecting proposed RICO amendment to complaint as untimely); *Davis v. Grusemeyer*, 996 F.2d 617, 622-27 (3d Cir. 1993) (RICO claims were untimely notwithstanding defendants' alleged fraudulent concealment of predicate acts); *Glessner*, 952 F.2d at 708 (plaintiffs' alleged "further injury" was not a "new and distinct injury from the initial injury"); *Fineberg v. Credit Int'l Bancshares*, 857 F. Supp. 338, 349 (D. Del. 1994) (predicate acts that allegedly prolonged limitations period were not "related to" and in "continuity with" pattern of racketeering activity alleged by plaintiff); *Owens v. Wade*, 789 F. Supp. 168, 172-75 (E.D. Pa. 1992) (same); *Korman v. Trusthouse Forte PLC*, 786 F. Supp. 458, 462-66 (E.D. Pa. 1992) (same); *Panna v. Firstrust Sav. Bank*, 749 F. Supp. 1372, 1377-78 (D.N.J. 1990) (applying *Keystone* and finding civil RICO claims time-barred), *vacated on reconsideration*, 760 F. Supp. 432, 437-38 (D.N.J. 1991) (applying *Keystone* and finding RICO claims timely); *Anderson v. Consol-Pennsylvania Coal Co.*, 740 F. Supp. 1126, 1130-31 (W.D. Pa. 1990) (allegations of fraudulent concealment were insufficient to defeat defendants' claim that plaintiffs had "actual notice of their claims" more than four years before filing suit), *aff'd*, 945 F.2d 394 (3d Cir. 1991), *cert. denied*, 502 U.S. 1075 (1992).

> lies in the fact that RICO is a crime of association, which is violated, *inter alia*, by "any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise's affairs through a pattern of racketeering." 18 U.S.C. §1962(c). Therefore the discovery rule must apply to the pattern element as well as the injury element. If the plaintiff does not discover until, for example, five years after the first injury to that plaintiff, that the injury or injuries were part of a pattern of racketeering, then that plaintiff could not bring a successful civil RICO action using the last injury discovery rule. Thus, the last injury discovery rule would not effectively fulfill the purpose of the statute where predicate acts which are part of the same "pattern" and which do not injure the plaintiff occur after the last injury to the plaintiff.

843 F.2d at 1129-30. *See also Greenberg v. Tomlin*, 816 F. Supp. 1039, 1051 (E.D. Pa. 1993) (plaintiff's RICO limitations period "must be measured from the time it knew or should have known of the pattern of racketeering activity" because if the plaintiff's "knowledge of injury arises solely from a single predicate act," it will have "discovered the injury but not the pattern").

Recognizing that "[t]he primary source of RICO's unique character is its pattern requirement," *Granite Falls*, 924 F.2d at 153,[23] three sister circuits have followed *Keystone* in applying discovery principles to *both* the injury

[23] In *Malley-Duff*, 483 U.S. at 154, this Court made it clear that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." (Emphasis in original). In *Sedima*, 473 U.S. at 497, this Court clarified the fact that "the essence of the violation is the commission of those [predicate] acts in connection with the conduct of an enterprise." *See also Keystone*, 863 F.2d at 1133 ("Given the Supreme Court's emphasis on the pattern element [in *Malley-Duff* and *Sedima*] as the core of the violation, the [injury] discovery rule's focus on injury is misplaced.").

and pattern elements for accrual purposes. *See id.* at 154 (Eighth Circuit); *Bath*, 913 F.2d at 820 (Tenth Circuit); *Bivens Gardens*, 906 F.2d at 1553-54 (Eleventh Circuit). None of these courts, however, adopted the "last predicate act" discovery element of the *Keystone* accrual rule. In *Bivens Gardens*, the Eleventh Circuit distinguished *Keystone* factually and incorporated a limiting "separate accrual" exception to its rule. 906 F.2d at 1554-55. In *Granite Falls*, the Eighth Circuit embraced the *Bivens Gardens* "separate accrual" rule, stating that "the *Bivens Gardens* rule better reflects the underlying policy of a statute of limitations requiring diligence on the part of the plaintiff than does the seemingly more open-ended rule fashioned by the Third Circuit in *Keystone*." 924 F.2d at 154. In *Bath*, the Tenth Circuit adopted the *Bivens Gardens* rule without commenting on the *Keystone* rule. 913 F.2d at 820.[24]

The unique nature of a civil RICO cause of action, which requires allegation and proof of injuries caused by a pattern of racketeering activity, *see* 18 U.S.C. §1962(a), (b), (c) and (d) and notes 7 and 20, *supra*, at the very least mandates this Court's adoption of the injury- and pattern-based accrual rule followed in the Third, Sixth,

[24] District courts in several circuits have adopted all or part of the *Keystone* "last predicate act" accrual rule. *See, e.g., Crowe v. Smith*, 856 F. Supp. 1178, 1184-85 (W.D. La. 1994) (following *Keystone*); *Coal-Mac, Inc. v. JRM Coal Co.*, 743 F. Supp. 499, 501 (E.D. Ky. 1990) (approving of *Keystone* insofar as it held that a civil RICO claim accrues when the plaintiff knows or should know of the existence of all elements of the claim); *Indianapolis Hotel Investors, Ltd. v. Aircoa Equity Interests, Inc.*, 733 F. Supp. 1406, 1408-10 (D. Colo. 1990) (same).

Eighth, Tenth and Eleventh Circuits (*see* notes 9-10, *supra*), and, NASCAT respectfully submits, the "last predicate act" rule elucidated by the Third Circuit in *Keystone*, 859 F.2d at 1130-31.[25]

D. RICO's Express Purpose, Statutory Language And Legislative History Mandate Adoption Of The "Last Predicate Act" Accrual Rule

Any accrual rule that this Court recognizes for civil RICO cases must be reconciled with the statute's definitional section, which provides that a "pattern of racketeering activity" requires "at least two acts of racketeering activity . . . *the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.*" 18 U.S.C. §1961(5) (emphasis added). *See H.J., Inc.*, 492 U.S. at 237 (observing that §1961(5) "places an outer limit on the concept of a pattern of racketeering activity that is broad indeed"). Remarking on this statutory provision, in *Keystone* the Third Circuit stated that "the accrual rule we fashion must take the specific language of the statute into account." 863 F.2d at 1132. As a result, in the words of Judge Mansmann:

> [T]here is inherent in the statute a ten year limit on the point at which the last predicate act for purposes of accrual may occur. Congress in enacting the ten year limit must have envisioned causes of action which would involve patterns of racketeering extending over that period of time. It would be inconsistent with this breadth of definition for us to state that we will look to the past ten years to see if a civil RICO claim exists but if we find ten years of racketeering activity, all related and all perpetrated by the same defendants, we will provide a remedy only to those who were victimized within the past four years. To do so would encroach upon and limit a legislatively-enacted scheme to provide recovery for racketeering injuries. *See* 18 U.S.C. §1961(5), 1964(c).

Id. at 1132-33 (footnote omitted).[26] In *Keystone*, the Third Circuit correctly concluded that §1961(5) of RICO,

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[25] Bolstering the determination that the *Keystone* last predicate act discovery rule is the appropriate civil RICO accrual rule is Congress' dictate that RICO "shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act, Pub. L. No. 91-452, §904(a), 84 Stat. 947 (1970) (codified at 18 U.S.C. §1961 note). Moreover, this Court made clear in *Sedima* that this dictate of Congress, coupled with "Congress' self-consciously expansive language and overall approach" mandate that "RICO is to be read broadly." 473 U.S. at 498.

[26] In *H.J., Inc.*, 492 U.S. at 242, this Court posited a hypothetical illustration of a RICO "pattern of racketeering activity" involving multiple victims, stating in pertinent part:

> Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity.

Id. Given "the federal interest in providing relief to those who are injured by a course of continuous and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period." *County of Cook v. Berger*, 648 F. Supp. 4336, 435 (N.D. Ill. 1986). In that case, the district court determined that since "it is the continuing nature of the violation that is the very essence of a RICO claim," *id.* at 435 n.1, the statute of

coupled with the fact that "[i]t is the continuing nature of the violation which distinguishes a RICO claim from claims arising simply from a predicate act . . . require[d] the ["last predicate act" discovery] rule [it] announce[d]." *Id.* at 1131.

Of the several characterizations of the civil RICO claim that have been made,[27] the most applicable is that of RICO as a *continuing* violation. In *Keystone*, 863 F.2d at

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limitations would run from the "last overt act" committed as part of the pattern, and Judge Kocoras rejected defendant's contention that the statute of limitations should run from the time when the County of Cook knew, or should have known, of its injury.

[27] In the words of one commentator:

> A court faced with determining an appropriate rule of accrual would first "characterize" the claim. The first step in the analysis should consider whether the RICO claim is characterized best as (1) an action to recover for a continuing violation, or (2) an action to recover for harms caused by particular predicate acts, many of which are kept secret from the plaintiff at the time of injury. If RICO is primarily an action to recover for a continuing violation, then the claim should not accrue until the plaintiff can allege a pattern. But if compensating injury was the main concern of the RICO drafters, then the claim should accrue upon injury or when plaintiff becomes aware of such injury.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1405 (footnotes omitted). "Neither characterization is entirely satisfactory" because "[t]he pattern requirement suggests the RICO action is similar to a continuing violation, but the nature of the predicate acts suggests that RICO is similar to an action to recover for fraud." *Id.* Indeed, in *Malley-Duff*, 483 U.S. at 152, this Court held that the predicate acts that establish racketeering activity under RICO are "far-ranging and cannot be reduced to a single generic characterization."

1131, the Third Circuit relied in part on the district court's decision in *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978), where Judge Lasker, when examining a criminal RICO violation, explained:

> *[RICO] provides an example of a continuing offense for purposes of computing the time at which the statute of limitations begins to run.* The "nature of the crime . . . is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie v. United States*, 397 U.S. 112, 115 (1970). The language of [RICO], which makes a pattern of conduct the essence of the crime, "clearly contemplates a prolonged course of conduct." *Id.* at 120. Like the statute of limitations for conspiracies, which runs from the date of the last overt act, *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957), the statute of limitations for violations of [RICO] runs from the date of the last alleged act of racketeering activity.

432 F. Supp. at 59 (emphasis added; parallel citations omitted). In criminal RICO cases brought under §1962(c), the statute of limitations begins to run from the date of the last predicate act of racketeering activity, *see, e.g., United States v. Torres Lopez*, 851 F.2d 520, 524-25 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989); on the other hand, in prosecutions under §1962(a), the statute begins to run on the last date of use or investment of income derived from a pattern of racketeering activity, rather than on the date of the last predicate act of racketeering activity, *see United States v. Vogt*, 910 F.2d 1184, 1196-97 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991). In *Keystone*, the Third Circuit stated that "[a]n interesting analogy to the ["last predicate act"] rule which we announce is the accrual rule in RICO conspiracy cases," noting that "in §1962(d) conspiracy cases, no overt act need be proven." 863 F.2d

at 1132 (citations omitted). Therefore, "the statute of limitations in conspiracy cases where no overt act need be proven, such as a RICO conspiracy, does not run from commission of the last overt act; the conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor fully accomplished." *Id.*[28]

With the exception of the Third Circuit in *Keystone*, 863 F.2d at 1129-30, and the Eighth Circuit in *Granite Falls*, 924 F.2d at 154, none of the circuit courts addressing the accrual issue have reconciled their respective accrual rules with the express language of §1961(5) of RICO. In *Granite Falls*, the Eighth Circuit reasoned that

> [a] violation of [§]1962 results not merely from a single act of racketeering activity but from a pattern of racketeering activity, which by definition requires at least two predicate acts occurring within a ten year period. In selecting a term of ten years within which predicate acts could occur to establish the pattern requirement, Congress must have contemplated recovery for remote acts and even for remote injuries.

924 F.2d at 154. Yet, in the next paragraph, the court rejected the "seemingly more open-ended" *Keystone* accrual rule and adopted the rule of "separate accrual" elucidated by the Eleventh Circuit in *Bivens Gardens*. *Id.*

In *Rodriguez*, the First Circuit briefly addressed §1961(5) of RICO, noting that the *Keystone* accrual rule, when applied in conjunction with §1961(5), could potentially allow an injured RICO plaintiff fourteen years to bring suit. 917 F.2d at 664. The First Circuit found this "difficult to reconcile" with this Court's "determination that 'there is a need for a uniform statute of limitations for civil RICO' lest 'the memories of witnesses . . . fade[] or evidence [be] . . . lost." *Id.* at 667 (quoting *Malley-Duff*, 483 U.S. at 156). NASCAT respectfully submits that the *Rodriguez* court misapprehended this Court's decision in *Malley-Duff* for several reasons. First, in *Rodriguez* the First Circuit voiced concern over loss of evidence and witnesses' memories in response to Justice Scalia's position in his dissent in *Malley-Duff* that *no* statute of limitations should apply if state codes fail to furnish an appropriate limitations period. 483 U.S. at 170 (Scalia, J., dissenting), not in reference to the need for a uniform statute of limitations. *Id.* at 155-56. Second, in *Malley-Duff* this Court answered the need for a uniform statute of limitations for civil RICO by establishing a four-year limitations period; however, as noted above (*see* note 3, *supra*), this Court expressly reserved the limitations issue, thereby emphasizing the importance of separating these issues. *Id.* at 156-57. Additionally, the First Circuit's apparent concern in *Rodriguez*, 917 F.2d at 667, that a plaintiff might have fourteen years in which to sue under RICO after defendants committed their first predicate criminal act against him neglects to consider the fact that

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[28] As Judge Mansmann continued the analogy:

> The Supreme Court has determined that a conspiracy *requiring* an overt act is deemed complete for statute of limitations purposes at the time of completion of the last overt act. The period of limitations in conspiracy cases requiring an overt act is tolled by each overt act done pursuant to the agreement. . . .
>
> By analogy the last predicate act of a pattern of racketeering activity is an appropriate place for civil RICO causes of action to accrue. As the court in *County of Cook* stated, "[t]he principles of conspiracy law ought clearly to apply, and so long as any of the predicate acts occur within the limitations period, a defendant should have to answer for all of his related and continual acts of harm." 648 F. Supp. at 435.

Keystone, 863 F.2d at 1132 (emphasis in original; citations omitted).

this right to sue only extends if the defendants *continue* to commit criminal acts against him.

In *Rodriguez*, the First Circuit concluded its criticism of the breadth deliberately accorded by §1961(5) of RICO by stating that "[i]n any event, we do not know why a knowledgeable plaintiff should have fourteen, rather than four years to bring suit." 917 F.2d at 667. However, "this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress." *Sedima*, 473 U.S. at 499; *see also United States v. Thomas*, 991 F.2d 206, 215 (5th Cir.), *cert. denied*, 510 U.S. 1014 (1993) ("Actual or potential aberrant results, however, do not excuse reading (or writing) anything into or out of a statute that Congress has so consciously adopted."). Moreover, the First Circuit's assertion ignores the fact that until the second predicate act is committed – a time which might be *years* after the first predicate act is committed – plaintiff cannot allege a pattern of racketeering activity and, under this Court's (and the lower federal courts') formulation of the applicable elements, no viable civil RICO claim exists. *See H.J., Inc.*, 492 U.S. at 239; *Grimmett*, 75 F.3d at 512; *McCool*, 972 F.2d at 1465 (a RICO cause of action cannot accrue until all of the elements exist).

NASCAT respectfully submits that to the extent the circuit courts other than the Third Circuit have discussed and analyzed the "last predicate act" rule announced in *Keystone*, their rejection of that rule is unconvincing and should not preclude this Court from giving the Third Circuit's extensive discussion of the issue, 863 F.2d at 1127-35, its careful consideration.[29]

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[29] As noted above (*see* note 8, *supra*), commentators have uniformly criticized the "injury discovery" rule followed by the

IV. CONCLUSION

Given RICO's statutory language, the unique nature of the civil RICO cause of action and the elements required to assert a claim, adoption of the injury- and pattern-based accrual rule followed in the Third, Sixth, Eighth, Tenth and Eleventh Circuits, supplemented by the "last predicate act" discovery rule elucidated by the Third Circuit in *Keystone*, 863 F.2d at 1130-33, is mandated

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court below; however, commentators have recognized the validity of the *Keystone* accrual rule:

> [T]he last predicate act discovery rule adopted by the Third Circuit seems the most sensible rule for RICO accrual . . . By running the statute of limitations from the discovery of the last predicate act of the defendant, and by allowing recovery for the entire pattern of injurious acts, the last predicate act discovery rule recognizes the competing characterizations of RICO as an action to recover for a continuing violation and as an action to recover for injury caused by fraud. This method of accrual also maintains a balance of plaintiffs' and defendants' rights, as it limits recovery to those acts falling within the meaning of "pattern," which by definition cannot occur more than ten years before the last predicate act. . . .
>
> Because it accounts for the two competing characterizations of RICO while maintaining a balance between plaintiffs' and defendants' rights, the last predicate act discovery rule provides the best solution to the complex problem of determining when a RICO cause of action accrues.

Humes, *Uniform Rule of Accrual*, 99 Yale L.J. at 1418.

in this case. For the reasons stated herein, the decision of the court below should be reversed.

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